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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1504

COWDEN MANUFACTURING COMPANY,
Petitioner,

vs.

KORATRON COMPANY, INC., and
KORACORP INDUSTRIES, INC.,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not yet reported. Both it and the memorandum of the District Court appear in Appendix A to the petition.*

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Inasmuch as there was no final order of the District Court, the Court of Appeals had jurisdiction only of an appeal from an in-

*That appendix will be referred to as "App." The record in the Court of Appeals contained an appendix to the briefs, which will be referred to as "C.A.App."

terlocutory order denying a preliminary injunction, under 28 U.S.C. § 1292(a)(1). It had no jurisdiction of other matters sought to be touched on in the petition.

QUESTIONS PRESENTED

The petition pretends to present four questions. But none is before this Court. Petitioner, plaintiff below, admits (Pet. p. 20) that it "is asking this Court . . . to render a final decree on the merits." The request is bold and novel, for there has been no trial, no evidentiary hearing in the District Court. Indeed, issue has not even been joined there. No answer to the complaint has been filed. The case is pending in the District Court on a motion by defendant (respondent) to dismiss for lack of jurisdiction or venue or to transfer under 28 U.S.C. § 1404(a).

The only question conceivably before the court below, the only question on which it passed, and the only one which could possibly be tendered to this Court is this triviality:

> Did the District Court for the Eastern District of Kentucky abuse its discretion in denying petitioner's application for a preliminary injunction against proceedings by respondent in the District Court for the Northern District of California to compel arbitration of disputes under a patent license agreement?

STATEMENT OF THE CASE

Some connection between the facts and the statement of the case in the petition is discernible.

Respondent Koratron Company, Inc. ("Koratron"), a California corporation, owns the patents on a process of making "permanent press" garments (R. 97).* Petitioner ("Cowden") is a

*As the opinion below states (App. A, p. 1, fn.), the other respondent, "Koracorp Industries Inc., is a California corporation and the owner of the stock of Koratron. It is not independently involved in any of the questions here at issue." It was mentioned for the first time in Cowden's second amended complaint, apparently for the purpose of furnishing Cowden a co-conspirator for Cowden's claims under § 1 of the Sherman Act. (C.A. App. p. 2, item 22)

garment maker. It obtained a license from Koratron to use the patented process, for which it agreed to pay royalties to Koratron (R. 33-45). Koratron audited Cowden's books and concluded that Cowden had failed to pay more than $134,000 in royalties, due under Koratron's interpretation of the license (R. 65).

Because the license agreement provides for resolution of disputes by arbitration in San Francisco rather than suit (R. 44), Koratron filed a demand for arbitration with the American Arbitration Association in San Francisco (R. 63-66). Cowden's response was to rush into the District Court for the Eastern District of Kentucky with this suit, in which it alleged a variety of contract, patent, antitrust and trademark claims, and it applied herein for a preliminary injunction to prevent Koratron from proceeding with arbitration (R. 88). This being Cowden's first manifestation of refusal to arbitrate as provided by the contract, Koratron filed a petition under the federal Arbitration Act (9 U.S.C. § 1, et seq.) in the District Court for the Northern District of California, the only federal court with jurisdiction to hear such a petition, but abstained from pursuing it until Cowden's application in the present case for a preliminary injunction was denied by the District Court in Kentucky (App. 5, 6). Thereafter the District Court in California granted Koratron's petition to compel arbitration, and Cowden appealed that order to the Court of Appeals for the Ninth Circuit. After argument and submission of that appeal, this Court decided *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), and the Ninth Circuit vacated the arbitration order and remanded it to the California District Court for reconsideration in the light of the *Lear* decision (App. 2).

Meanwhile, Cowden moved for summary judgment in this case in the District Court in Kentucky (R. 118-121).* Previously Kora-

*The petition seems to refer to a motion by Cowden in the District Court for a "declaratory judgment" as if it were something different from its motion for a summary judgment. But a motion for judgment on a complaint, before issue is joined or the case is tried, is a motion for summary judgment.

tron had moved to dismiss this case for lack of personal jurisdiction and venue, to transfer it to California under 28 U.S.C. § 1404(a) or § 1406, or to stay it pending the outcome of proceedings in California (App. 2). The District Court entered an order postponing these several motions of Koratron and Cowden and staying proceedings until a decision by the Ninth Circuit on Cowden's appeal there* (App. 7-9), but before the Ninth Circuit ruled Cowden appealed to the Sixth Circuit from the interlocutory orders in this case denying its request for a preliminary injunction, postponing decision on its motion for summary judgment and temporarily staying proceedings.

The Sixth Circuit affirmed. It is to that judgment Cowden directs the instant petition.

DISCUSSION

There is no conceivable basis for seeking the writ. No conflict is involved, no questions of substance have yet been decided, no novel rule of law announced.

Portions of the petition seem to ask this Court to review the decisions of the Ninth Circuit and the District Court in California as to arbitrability of various issues and as to whether arbitration should precede or follow judicial resolution of non-arbitrable issues (See Pet. pp. 8-16). It would seem obvious that the decisions of those courts are not reviewable by a writ to the Sixth Circuit. There can be no arbitration unless and until the courts in the Ninth Circuit so direct. All that is involved is an appeal from denial of a preliminary injunction to restrain arbitration and from postponement of decision on a motion for summary judgment in favor of plaintiff on its complaint.

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*The petition erroneously states (pp. 10, 11, 17) that the stay was "indefinite," but the order of the District Court is quite plain and leaves no room for that assertion (App. 8).

There is no basis for reviewing the denial of a preliminary injunction

On review of a grant or denial of a preliminary injunction, the test is whether the lower court abused its discretion. *Nashville I-40 Steering Comm. v. Ellington,* 387 F.2d 179, 182 (6th Cir. 1967), *cert. denied,* 390 U.S. 921 (1968). Basic to any application for an injunction is lack of an adequate remedy otherwise. Koratron could not force Cowden to arbitrate in San Francisco except by bringing appropriate proceedings to compel arbitration, and the federal court with jurisdiction of such proceedings is the court in San Francisco (9 U.S.C. § 4; *Continental Grain Co. v. Dant & Russell, Inc.,* 118 F.2d 967 (9th Cir. 1941); see also, *China Union Lines v. Steamship Co. of 1949, Inc.,* 136 F.Supp. 597 (S.D.N.Y. 1955)). Cowden could and did present all of its objections to arbitration in the proceedings in San Francisco, both in the District Court there and in the Ninth Circuit; it plainly had an adequate remedy. As the District Court in Kentucky concisely stated (R. 100)

> "There is a case pending which is the proper forum for the determination of whether or not the items claimed by the plaintiff here are subject to arbitration under the terms of the contract."

There is no basis for a writ to review postponement of ruling on the motion for summary judgment

An order denying a motion for summary judgment is not even an appealable order. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966). *A fortiori,* postponement of a ruling on such a motion is not appealable. A court has a wide discretion in handling its own calendar; to hold otherwise would undermine the strong federal policy against piecemeal appeals. See 385 U.S. at 24-5.*

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*Neither *Landis v. North American Co.,* 299 U.S. 248 (1936), nor *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820 (9th Cir. 1963), cited by petitioner, is in point. In *Mach-Tronics* the Court of Appeals corrected a

Incredulously, Cowden asks this Court to undertake the task of a trial court and "render a final decree on the merits" and to do so by way of summary judgment (Pet. pp. 18-22), although no court below has yet purported to rule on the merits!

In this connection Cowden repeatedly asserts, as if they were facts, what are merely contentions; e.g., that Koratron's patents are "invalid" (Pet. 3), that Cowden produces garments "under a system different from" Koratron's (Pet. 3), that Koratron has violated the antitrust laws (Pet. 5) and the like. Yet all these assertions involve questions of fact yet to be tried. To give but one example, Cowden states (Pet. 5) that Koratron's patent licenses to garment makers "require Cowden to purchase unpatented materials for the manufacture of garments. . . ." That is simply not so and is not made true by the vociferousness and repetition of the assertion. The license contains no such requirement (R. 33-47), and an exhibit to Cowden's own Amended Complaint is a letter from Koratron to Cowden of February 3, 1967 showing that there was no such requirement (R. 48). If Cowden has any evidence looking the other way, it would but create a conflict, not resolvable on summary judgment. Other assertions by Cowden of antitrust violation rest on interpretations of the license which Cowden would impose on the license by torture and which Koratron disavows; the correct interpretation awaits trial.

Petitioner is asking this Court to use its certiorari jurisdiction to do what it has held no court of appeals may do under its appellate jurisdiction, viz., to decide a case on the merits where the facts have not been developed in the trial court. *Fountain v. Filson*, 336 U.S. 681 (1949). The cases cited by Cowden (Pet. p. 19) are not to the contrary. *Hurwitz v. Directors Guild of America*,

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virtual abdication of federal jurisdiction in favor of state court litigation. What was held to be an abuse of discretion in *Landis* was a stay pending trial and final review by the Supreme Court of a "test" case between different parties entirely.

Inc., 364 F.2d 67 (2nd Cir.), *cert. denied*, 385 U.S. 971 (1966), was a case where the plaintiffs were entitled to the relief asked on the face of the pleadings. In *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968), the parties agreed that the facts were undisputed, both moving for summary judgment.

Cowden's charges parrot those made in a number of other cases to which Koratron is a party and other garment makers are its adversary. Some were commenced in the Northern District of California, others have been sent there under the new 28 U.S.C. § 1407 by the Panel on Multidistrict Litigation, *In Re Multidistrict Patent and Antitrust Litigation Involving Koratron*, 302 F. Supp. 239 (1969), and others have been transferred there under 28 U.S.C. § 1404(a) (see fn 2, 302 F.Supp. 239, 241). All these cases are now proceeding in extensive consolidated discovery and deposition taking in which the evidence pertinent to the various charges is being developed. In due course they will be tried, and the issues will be presented in an orderly way. Cowden's case belongs in that group. Thus far the Panel on Multidistrict Litigation has stayed its hand from sending this case to join the others solely because it was on appeal, and Cowden resists the transfer now on the excuse that it is seeking certiorari.

CONCLUSION

It is apparent that Cowden's purpose is to delay as long as possible the orderly disposition of its dispute with Koratron. We respectfully submit that the petition lacks any shred of merit and should be denied.

Dated: San Francisco, California, May 22, 1970.

MOSES LASKY
Attorney for Respondents.